Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

VILLAGE OF NEW LEBANON, et al.,
Petitioners,

v.

CYNTHIA BUNCH, ETC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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37 pp

I

QUESTION PRESENTED FOR REVIEW

This case presents a significant question not yet decided by this Court in this factual context, and is also the subject of a conflict between the decision of the Sixth Circuit Court of Appeals in this case and the decision of the Fifth Circuit Court of Appeals in Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir.1992) and the decision of the Eighth Circuit Court of Appeals in Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993), i.e.:

Whether a Police Officer Is, As a Matter of Law, Entitled to the Defense of Qualified Immunity When, Being Reasonably in Fear for his Life and That of a Fellow Officer, He Employs Deadly Force in Subduing His Assailant.

LIST OF PARTIES

Petitioners are:

Village of New Lebanon
Paul E. Shock, Mayor

Village of New Lebanon, Ohio

Craig A. Kenley, Council Member,
Village of New Lebanon

Lou Cooper, Council Member,
Village of New Lebanon

Kenneth R. Baker, Council Member,
Village of New Lebanon

Gary F. Cornett, Council Member,
Village of New Lebanon

Robert L. Crooks, Council Member,
Village of New Lebanon

Wilbur L. Schreiber, Council
Member, Village of New Lebanon

Pete Vecchi, Council Member,
Village of New Lebanon

Ronald L. Carbaugh, Individually
and as Chief of the New Lebanon
Police Department

Rodney Ables, Individually and
as New Lebanon Police Officer

III

Respondent is: Cynthia Bunch, individually
and as Administratrix of the
Estate of Aaron Matthew Bravard

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW I

TABLE OF AUTHORITIES VI

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTE 1

STATEMENT OF THE CASE 1

ARGUMENT 5

CONCLUSION 9

APPENDIX

Opinion of the United States Court of Appeals For The Sixth Circuit (Appendix A) 1a

Decision of the District Court for the Southern District of Ohio, Western Division (Appendix B) 7a

United States Code, Title 42, § 1983 (Appendix C) 16a

United States Constitution, Amendment IV (Appendix) 17a

United States Constitution, Amendment XIV (Appendix E) 18a

TABLE OF AUTHORITIES

CASES Page

Anderson v. Creighton
483 U.S. 635, 97 L.Ed. 2d 523,
107 S.Ct. 3034 (1987) 6

Anderson v. Liberty Lobby, Inc.
477 U.S. 242, 91 L.Ed.2d 202,
106 S.Ct. 2505 (1986) 5, 19

Fraire v. City of Arlington
957 F.2d 1268 (5th Cir. 1992) 6, 7

Graham v. Connor
490 U.S. 386, 104 L.Ed.2d 443,
109 S.Ct. 1865 (1989) 6, 7

Krueger v. Fuhr
991 F.2d 435 (8th Cir. 1993) 7, 8

Mitchell v. Forsyth
472 U.S. 511, 86 L.Ed. 2d 411,
105 S.Ct. 2806 (1985) 9

Tennessee v. Garner
471 U.S. 1, 85 L.Ed.2d 1,
105 S.Ct. 1694 (1985) 8

STATUTES

28 U.S.C.A. 1254(1) 1

28 U.S.C.A. 1291 2

28 U.S.C.A. 1333 2

42 U.S.C.A. 1983 ..... 1, 2

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OCTOBER TERM 1994

VILLAGE OF NEW LEBANON, et al.,
Petitioner

v.

CYNTHIA BUNCH, ETC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Neither the Opinion of the United States Court of Appeals for the Sixth Circuit nor the Decision of the Federal District Court for the Southern District of Ohio are published.

JURISDICTION

The judgment, of which review is now sought, was entered by the United States Court of Appeals for the 6th Circuit on May 31, 1995.

No rehearing or extension was sought.

This Court's jurisdiction in this proceeding is pursuant to 28 U.S.C.A. 1254(1)

CONSTITUTIONAL PROVISIONS AND STATUTE

Respondent's cause of action was pled under 42 U.S.C.A. 1983 alleging violation of the Fourth and Fourteenth Amendments to the Constitution. (Texts of these provisions and statutes are included in the Appendix hereto.)

STATEMENT OF THE CASE

A. Procedural Posture

The action was commenced in the District Court for the Southern District of Ohio by Cynthia Bunch, individually and as Administratrix of the Estate of Aaron Matthew Bravard, deceased, ("Bravard") against the Village of New Lebanon, Ohio and its Mayor, Council

Members, Police Chief and Officer Rodney Ables (Ables). The action was pled under 42 U.S.C.A. 1983 and alleged that Bravard's civil rights under the Fourth and Fourteenth Amendments to the Constitution had been violated through the use of excessive force, resulting in Bravard's death. Jurisdiction was vested in the District Court by virtue of 28 U.S.C.A. 1333.

A Motion for Summary Judgment was filed on behalf of the Defendants together with supporting affidavits. On September 26, 1994 the District Court entered an Order overruling that motion with prejudice on the issue of qualified immunity; sustaining the motion on the issue of illegal entry into the premises; and overruling it without prejudice as to all other issues.

Defendants timely filed their Notice of Appeal in the U.S. Court of Appeals for the Sixth Circuit on October 17, 1994, and Plaintiff filed a Notice of Cross-Appeal on October 27, 1994. Appellate jurisdiction was pursuant to 28 U.S.C.A. 1291.

By Per Curiam Opinion of May 31, 1995 the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

B. Statement of Facts

On January 15, 1990 Rodney Ables entered service as a full time police officer for the Village of New Lebanon, Ohio, having graduated from the Ohio Police Officer's Training Academy at Montgomery County, Ohio Joint Vocational School and having received a Bachelor of Science degree in criminal justice from the University of Dayton in Dayton, Ohio.

On November 1, 1991 the New Lebanon Police Department adopted a written policy governing the use of deadly force. That policy permitted an officer to use deadly force under the following circumstances:

> In self-defense, when the officer by careful and proper use of his faculties and in good faith believes, and has reasonable cause to believe, that he is in imminent danger of death or great bodily harm and his only means of escape from danger is to take the life of his attacker. It is important that the attacker has all the following elements: (a.) ability or apparent ability; (b.) opportunity; and (c.) jeopardy.
>
> In defense of another person, when the person being defended would be justified in using deadly force to defend himself.

Ables was instructed as to the deadly force policy at the New Lebanon Police Department and had received similar training in his studies.

While on duty on January 28, 1992, Ables was instructed by the police dispatcher to respond to a report of domestic violence at 712 Homeway, New Lebanon. It was reported that a male individual was threatening his mother with a knife at that address.

Upon his arrival at the indicated location, Chief Carbaugh and Sergeant Lunsford of New Lebanon as well as Patrolman LeRoy Murphy of the Jackson Township Police Department were already there. Chief Carbaugh was talking to a woman in the front yard of 712 Homeway. Ables heard the woman, whom he later

learned to be the mother, Mrs. Bunch, say that her son (Bravard) had threatened both to kill her and to cut his own wrists.

Ables then entered the garage of the residence where he joined Lunsford and Murphy preparing to search the house. It was about at this time that Ables drew and placed on ready his weapon, a Glock 9-mm semi-automatic handgun. Ables and Lunsford began their search and they were joined by Murphy while checking closets in a hallway.

Ables stepped into the doorway of a small "L"-shaped bathroom from which position he could see a combination bathtub/shower on the right but could not see around the corner into the rest of the bathroom. He stepped back out of the bathroom when he received a call on his portable radio from the dispatcher inquiring as to whether the officers were all right. He responded affirmatively.

Reentering the bathroom, as he approached the shower, he detected a movement on his right and felt a stinging sensation on his right hand which he later learned was a knife cut. He heard a loud yell from the shower and Bravard leaped out holding a knife in front of him. Bravard started to stumble but quickly regained his balance and, as Ables attempted to back away, Bravard advanced upon him with the knife above his head in a threatening position. As Bravard was bringing the knife downward toward Ables, the officer was unable to back away fast enough. He fired a single shot when Bravard was two to two and one-half feet from him and struck Bravard in the left chest. Still holding the knife, Bravard fell to the floor and was disarmed and handcuffed by Patrolman Murphy.

From the time Ables detected movement in the shower until he fired his weapon, two to three seconds elapsed. When he fired his weapon, Ables was in fear for his life and concerned for the safety of Patrolman Murphy.

ARGUMENT

Both the District Court's denial of summary judgment, and the affirmance of that decision by the Court of Appeals, were on the stated basis that genuine issues of material fact were presented by the affidavit of a pathologist to the effect that, based on the path of the bullet's entrance into Bravard's body, Bravard could not have been directly facing Officer Ables at the time the shot was fired.

The position of Petitioners is twofold. First, the difference between the pathologist's opinion and the testimony of Ables is such a minor discrepancy as not to constitute a genuine issue of material fact. Second, it does not go to the central issue of the objective reasonableness of Ables's belief that his and a fellow officer's life were threatened.

The impropriety of denying a motion for summary judgment on the basis of such a minor discrepancy was pointed out by this Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986):

> ... the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. (at 477 U.S. 247-248, emphasis in

original).

That principle was given application by the Court of Appeals for the Fifth Circuit in a case much like the present one. The following observation in Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992) could and should have been applied to the case at bar:

> Almost all excessive force cases are very fact intensive; this one is certainly no exception. And, although there are differing versions of some of the facts in this case, the discrepancies do not rise to the level of genuine issues of material fact. (at 1269-1270)

The test which has long been applied by this Court is whether the action of the police officer is "objectively reasonable" in light of the facts and circumstances confronting him. Graham v. Connor, 490 U.S. 386, 104 L.Ed 2d 443, 109 S.Ct. 1865 (1989). In applying the "objectively reasonable" standard in Anderson v. Creighton, 483 U.S. 635, 97 L.Ed 2d 523, 107 S. Ct. 3034 (1987), Justice Scalia, speaking for the majority of the Court, stated:

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials–like other officials who act in ways they reasonably believe to be lawful–should not be held personally liable. (at 641)

Bearing in mind that Officer Ables was suddenly

confronted with a knife wielding individual who had threatened his mother and his own life with the use of that knife, the following sentence from Chief Justice Renquist's opinion in Graham v. Connor, supra, is quite appropriate:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. (at 396)

and

> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. (at 396-397)

In ruling that a divergence between Officer Ables's testimony and that of a pathologist presented a genuine issue of material fact, the opinion of the Court of Appeals in this case is in conflict with that of the Court of Appeals for the Fifth Circuit in Fraire, supra.

Additionally, the appellate decision in this case is in conflict with that of the Court of Appeals for the Eighth Circuit in Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993) which granted qualified immunity to an officer who shot a fleeing suspect in the back in the belief that the suspect would turn and attack him.

In its opinion in the present case, the Court of

Appeals attempted to distinguish Krueger on two basis - (1) that, unlike the present case, Krueger involved a fleeing suspect, and (2)that the testimony of the officer in Krueger was undisputed. As to the first, any distinction between a fleeing suspect and an assailant is less than meaningless. Certainly, the use of necessary force in defending one's self and others from an assailant is more significant than preventing a suspect's escape. Further, the Court of Appeals ignored the fact that Fuhr, like Ables, believed he was threatened. As to the attempt of the Court of Appeals to distinguish Krueger because the officer's account of the occurrence was undisputed, the Court of Appeals commits the same error that places its decision in conflict with Fraire. It permits differing versions of an occurrence to rise to the level of genuine issues of material fact.

In a dissenting opinion in Tennessee v. Garner, 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985), Justice O'Connor made the following observation:

> Nonetheless, the reasonableness of Officer Hymon's conduct for purposes of the Fourth Amendment cannot be evaluated by what later appears to have been a preferable course of police action. (471 U.S. at 29)

Likewise, the reasonableness of Officer Ables's conduct for purposes of the Fourth Amendment cannot be evaluated on the basis of what a pathologist opined to be the position of the officer's assailant.

The desirability of early resolution of a public official's entitlement to qualified immunity has been well

recognized by this Court. (Mitchell v. Forsyth, 472 U.S. 511, 86 L.Ed. 2d 411, 105 S.Ct. 2806 (1985) and Anderson v. Creighton, supra). That objective was subverted by the courts below in this case. For that reason and because of the conflict thus created with decisions of two other circuits, we ask that this Court grant certiorari.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

CYNTHIA BUNCH, Individually and as Administratrix of the Estate of Aaron Matthew Bravard,	)	
Plaintiff-Appellee Cross-Appellant	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
v.	)	
VILLAGE OF NEW LEBANON, et al.	)	
Defendants-Appellants Cross-Appellees.	)	

BEFORE: SUHRHEINRICH and DAUGHTREY, Circuit Judges: HEYBURN, District Judge.*

PER CURIAM. Plaintiff Cynthia Bunch brought this civil rights action under 42 U.S.C. § 1983 against defendant Rodney Ables, a police officer employed by defendant Village of New Lebanon, the mayor and council members of the village and the Chief of the New

* The Honorable John G. Heyburn II, United States District Judge for the Western District of Kentucky, sitting by designation.

Lebanon Police Department. Bunch alleges that Ables used excessive force when he shot and killed her son, Aaron Bravard. Defendants appeal the district court's order denying their motion for summary judgment on the basis of a qualified immunity.[1] Because the order is appealable immediately as a final judgment under the collateral order doctrine, Walton v. City of Southfield, 995 F.2d 1331, 1336 (6th Cir. 1993), and because we find that the applicability of qualified immunity involves a question of fact, we **AFFIRM**.

I. FACTS

Bunch called the Montgomery County Sheriff's Office on January 28, 1992, to report a domestic dispute between her and her son. A police dispatcher subsequently informed Ables that a male individual was threatening his mother with a knife. The dispatcher instructed Ables to respond. When Ables arrived, chief Carbaugh and Sergeant Lunsford of the New Lebanon Police Department and Patrolman Murphy of the Jackson Township Police Department had already arrived. According to Ables, he heard Bunch say that her son had threatened to kill her and to cut his wrists.

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[1] Plaintiff cross appeals the district court's holding that, as a matter of law, exigent circumstances existed to justify Ables' warrantless entry into plaintiff's house. Because this appeal is taken from a nonfinal order and is neither an appealable interlocutory order nor certified under Fed. R. Civ. P. 54(b), it is beyond our jurisdiction and is dismissed. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 744-45 (1976).

Thereafter, Ables entered the garage of the residence where he joined Lunsford and Murphy. Ables had drawn his weapon, then the three entered and searched the house.

Ables stated that he entered an L-shaped bathroom, and as he approached the shower, he detected movement to his right. According to Ables, as he heard a loud yell from the shower, Bravard leaped from the shower. Ables further stated that as he backed away, Bravard advanced with a knife held overheard in a threatening position. Ables claimed that as Bravard brought the knife downward toward Ables, Ables fired a single shot. Bravard was approximately two feet away when Ables shot him. The bullet struck Bravard in the left chest. Ables stated that these events happened in about three seconds and that he was in fear for his life and concerned for the safety of the other officers.

II. ANALYSIS

The Fourth Amendment protects citizens from unreasonable search and seizure. Officer Ables' actions constituted a seizure within the meaning of the Fourth Amendment. Tennessee v. Garner, 471 U.S. 1, 7 (1985). To decide the issue before the court, we must determine de novo whether Ables' use of deadly force against Bravard was reasonable within the meaning of the Fourth Amendment. Yates v. City of Cleveland, 941 F.2d 444, 446 (6th Cir. 1991). The use of deadly force is limited to situations in which the "officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Garner, 471

U.S. at 11. An officer using deadly force is entitled to qualified immunity if "a reasonable officer could have believed [the seizure] to be lawful, in light of clearly established law and the information the [seizing] officer possessed." Hunter v. Bryant, 502 U.S. 224 (1991).

The district court denied defendants' motion for summary judgment based on qualified immunity, concluding that when there are "factual disputes surrounding a shooting such that the reasonableness of the shooting cannot be determined without determining which of competing versions of the facts are true, the reasonableness of the shooting and the applicability of the qualified immunity become questions for the jury." (District Court Opinion, p.3)(citations omitted).

Ables' version of the facts, if unrefuted, entitles him to immunity; however, plaintiff has produced evidence that conflicts with Ables' rendition. First, plaintiff submitted the affidavit of an expert medical pathologist. The medical expert, Dr. Donald Schaffer, after reviewing the evidence, including the deposition testimony of Ables and lab reports, stated, "It is physically impossible for the gunshot wound to Bravard to have occurred at a time when Bravard was directly facing Ables as described in Ables' testimony." Schaffer instead believes that the evidence indicates that Ables shot Bravard as Bravard exited the shower. Given the physical layout of the bathroom and the shower enclosure, Bravard was facing the east wall of the bathroom and in no position to pose a threat to Ables.

Plaintiff also provided a diagram of the bathroom,

indicating that the shower entrance is 14 inches wide when the bathroom door is open, and that one must step over a 14 and 3/4 inch tub enclosure to exit the shower. Bravard, at 5'10" and 190 pounds was too large to leap in the manner described by Ables. Plaintiff contends that to exit the shower enclosure in the manner described by Ables, it would be necessary to push the bathroom door closed to widen the 14 inch opening; yet, Ables testified that he was standing in front of the open bathroom door when he was attacked by Bravard.

Ables argues that the bullet angle does not create a genuine issue of material fact because it is immaterial as to whether Ables was reasonably justified in acting to protect himself. To support this contention, defendants city Krueger v. Fuhr, 991 F.2d 435, 437 (8th Cir.), cert. Denied, 114 S. Ct. 386 (1993)(reversing a denial of summary judgment on the basis of qualified immunity even though the defendant officer had shot a fleeing suspect in the back because the officer believed that the suspect would turn and attack him with a knife). Although Krueger seemingly supports Ables' action given his confinement in a small bathroom and his proximity to Bravard, Krueger is distinguishable. First, the Krueger decision authorized deadly force as it was "necessary to prevent [the] escape" of a fleeing felon. Id. at 440. Second, the officer's version of events in Krueger was uncontested.

Our case is analogous to Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988), a case distinguished by the Krueger court. In Samples, the seizing officer stated the victim was advancing toward the

officer with a knife when the officer shot him, yet the physical evidence showed that the victim was shot in the back. As occurred in Samples, here there is physical evidence calling into question the accuracy of the officer's explanation of what transpired. Schaffer has stated that the physical evidence is consistent with a version of events that would draw into question the reasonableness of Ables' conclusion that Bravard posed such a threat that shooting him was reasonable

Accordingly, we **AFFIRM** the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CYNTHIA BUNCH, etc., Plaintiff,	)	CASE NO. C-3-93-39
v.	)	JUDGE WALTER HERBERT RICE
VILLAGE OF NEW LEBANON, et al., Defendants.	)	**DECISION AND ENTRY**

DECISION AND ENTRY OVERRULING IN PART AND SUSTAINING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. #11); DEFENDANTS' OBJECTIONS TO EVIDENTIARY MATERIALS SUBMITTED BY PLAINTIFF (DOC #32) CONSTRUED AS MOTION TO STRIKE AND OVERRULED AS MOOT; REQUEST OF DEFENDANTS FOR ORAL ARGUMENT ON THEIR MOTION FOR SUMMARY JUDGMENT (DOC #12) RECONSIDERED AND OVERRULED; NOTATION ORDER OF NOVEMBER 22, 1993, VACATED; CONFERENCE CALL SET

This case arises from the death of sixteen year old

Aaron Bravard, who was the son of the Plaintiff, Cynthia Bunch. Aaron was shot to death by Defendant Rodney Ables, a police officer employed by the Defendant Village of New Lebanon. The Mayor and Council Members of the Village of New Lebanon are also Defendants, as is Ronald L. Carbaugh, who is sued both individually and officially in his capacity as the Chief of the New Lebanon Police Department. The Plaintiff claims that the shooting was a violation of the constitutional rights of the decedent, and that responsibility for said constitutional violation was attributable not only to Officer Ables, but to the Chief of Police and to the municipality, as well. The Plaintiff also appends state law claims for wrongful death, personal injury, and the infliction of serious emotional distress.

This matter is currently before the Court on the Defendants' motion for summary judgment. Doc. #11. As the Defendants seek qualified immunity from suit on the Plaintiff's federal claim, the Court previously ruled that discovery would initially be limited to the question of whether there is a genuine issue of material fact as to whether qualified immunity should be granted with regard to the shooting. Doc. #18.

Qualified immunity is to be granted when a reasonable official in the defendant's place could reasonably have believed that his or her actions were lawful, in light of clearly established law, given the information available to the defendant at the time of the action. Anderson v. Creighton, 483 U.S. 635, 638 (1987). It is, and was at the time of the events in question, clearly established that a person has a right not to be shot by police officers unless that person is perceived to pose a threat to the officers or to others. Yates v. City of Cleveland, 941 F.2d 444, 447 (6th Cir. 1991) (citing

Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988) (citing, in turn, Garner v. Memphis Police Dep't., 710 F.2d 240, 246 (6th Cir. 1983) aff'd and rem'd sub nom. Tennessee v. Garner, 471 U.S. 1 (1985))). Where there are factual disputes surrounding a shooting such that the reasonableness of the shooting cannot be determined without determining which of competing versions of the facts is true, the reasonableness of the shooting and the applicability of qualified immunity becomes questions for the jury. Brandenberg v. Cureton, 882 F.2d 211, 215-216 (6th Cir. 1989); Yates, 941 F.2d at 447.

The Defendants have offered, through deposition testimony, a version of events that would support a grant of qualified immunity. Essentially, the Defendants state that Aaron Bravard was attacking Officer Ables with a knife when Ables shot him. Aaron was shot in the bathroom of his home. The Defendants assert that Aaron leapt from a hiding place in the shower and, after doing so, turned to attack Officer Ables. The Plaintiff, however, has produced an affidavit of an expert medical pathologist and former Deputy Coroner that, based upon his review of the evidence, including the deposition testimony offered by the Defendants and the forensic and crime laboratory reports, he is of the opinion that "it is physically impossible for the gunshot wound to Bravard to have occurred at a time when Bravard was directly facing Ables as described in Ables' testimony [.]" Affidavit of Donald Schaffer, M.D. (attached to Doc. #29). Instead, Dr. Schaffer swears that, to a reasonable medical certainty, "the nature of the gunshot wound inflicted on Mr. Bravard by Officer Ables is entirely consistent with Mr. Bravard having been shot while Mr. Bravard was in position facing the eastern bathroom wall such as that described by Officer Ables as the position Mr. Bravard was in as he exited the shower." Id. The Plaintiff has

thus produced evidence that it is possible that Aaron Bravard was not facing Officer Ables when he was shot.[1] Reading the evidence in the light most favorable to the Plaintiff, who is the non-moving party, it appears that a reasonable trier of fact could conclude from this evidence that Officer Ables could not reasonably have felt threatened by Aaron at the time he fired his weapon.

The Defendants argue that the Plaintiff has seized upon " 'minor inconsistencies' " between the Officer's account of the events and the physical evidence, which minor inconsistencies do not create a genuine issue of material fact. Doc. #33 at 6 (citing and quoting from Pirsein v. Village of Berrien Springs, 980 F.2d 731 (6th Cir. 1992) (unpublished, attached as Exhibit "B" to Doc. #11)). This is not a case of minor inconsistencies. In Piersein, the medical examiner had found the wounds to have been consistent with the officer's account of the events. In this case, a former Deputy Coroner has stated that it is physically impossible for events to have occurred as Officer Ables has described them. Furthermore, he has stated that the physical evidence is consistent with a version of events that would draw into question the reasonableness of Officer Ables' conclusion that Aaron Bravard posed such a threat that shooting him was a lawful course of action. Accordingly, there are genuine issues of material fact as to the events surrounding the shooting, and whether Officer Ables could reasonably

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[1]The testimony of another medical pathologist, Dr. Lee Lehman, relied upon by the Plaintiff, might be described as equivocal. Nevertheless, even if Dr. Lehman's testimony directly contradicted the affidavit of Dr. Schaffer, such evidence would not remove the genuine issue of material fact created by Dr. Schaffer's affidavit, since, on a motion for summary judgment, the Court is not to weigh the credibility of affiants and deponents.

have believed that he was justified in using deadly force.[2]

The Defendants have filed objections to some of the evidentiary materials submitted by the Plaintiff (Doc. #32), which objections this Court will construe as a motion to strike said materials. As this Court, in making its findings on the issue of qualified immunity, has considered neither the "deposition summary" nor the opinions expressed by Ms. Bunch in her affidavit, the motion to strike is moot insofar as it seeks to strike those materials. As the Plaintiff has now filed certified copies of the post mortem examination report and the two letters from the Miami Valley Regional Crime Laboratory (Doc. #34), the motion to strike is moot insofar as it seeks to strike those materials. The motion to strike (Doc. #32) is, therefore, overruled in its entirety as moot.

The Plaintiff has also argued that the police

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[2] This finding is made in the context of the qualified immunity issue to which this Court limited its consideration of the Defendants' motion for summary judgment, in its Order of December 14, 1993 (Doc. #18). This limitation was ordered, with the agreement of counsel, even though the Defendants had addressed the contention that there did not exist a genuine issue of material fact on the commission of a constitutional tort (as well as other contentions) in the memorandum accompanying their motion for summary judgment. It appears to the Court that the finding of genuine issues of material fact surrounding the justifiability of the shooting for qualified immunity purposes would logically, if not necessarily, lead to a determination that there are genuine issues of material fact as to whether the shooting amounted to a constitutional tort. However, the Court having limited its consideration at this point solely to the qualified immunity question and the issues necessary to decide that question (including the lawfulness of the officers' presence in the Bunch/Bravard home), no ruling is made as to whether there is a genuine issue of material fact as to the commission of a constitutional tort. See Doc. #18.

officers entered her house illegally on the afternoon that Aaron was shot. If there were a genuine issue of material fact as to whether the officers had violated clearly established law in entering the premises, and thus unreasonably placed themselves in the situation that led to the shooting, qualified immunity would be inappropriate. See Yates, 941 F.2d at 446-448. Thus, it is necessary to rule on the question of the lawfulness of the officers' presence in the home. The uncontradicted evidence before the Court is that Plaintiff herself had called the police, had informed them that Aaron had a knife, and had informed them that he had threatened her life and his own. Given these facts, exigent circumstances justified the officers' warrantless entry into the Bunch/Bravard home.[3] Russo v. City of Cincinnati, 953

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[3] The Plaintiff has stated that "Ables is not aware of any legally recognized exigent conditions which would allow him to enter Bunch residence without either consent or warrant [,]" particularly in light of the fact that Ms. Bunch was outside the house and in no apparent danger at the time the officers entered. Doc. #29 at 5-6. This assertion is not a direct quotation of Defendant Ables, but appears to hinge on the fact that Ables had not personally been informed that Aaron was a threat to himself. Id. (citing portions of the Deposition of Rodney Ables). Defendant Ables, was, however, personally informed by the dispatcher that Aaron had threatened his mother with a knife. Deposition of Rodney Ables at 9. Furthermore, Ables followed two other officers into the home. The Plaintiff offers no evidence to dispute the testimony of those officers that she (the Plaintiff) had made them personally aware that Aaron was a threat to himself. Deposition of Leroy E. Murphy, Jr., at 28-31; Deposition of David J. Lunsford at 20-21; Deposition of Ronald J. Carbaugh at 120-122 (all stating that Plaintiff had drawn her hand across her wrist, indicating that Aaron had threatened to cut his own wrists). Officer Ables, arriving on the scene after the other officers, could reasonably have thought his action of entering the house to be lawful in light of the information available to him at the time; it was not unreasonable of him to assume that the other officers were entering the home

F.2d 1036, 1043-1044 (6th Cir. 1992). Although, as discussed above, qualified immunity is denied on the basis of the genuine issues of material fact surrounding the circumstances of the shooting, the Court does explicitly state that the presence of the officers in the home was reasonable as a matter of law, and is not in any way a basis for the denial of qualified immunity in this case.

Defendants sought summary judgment on grounds aside from qualified immunity. This Court, however, limited discovery and its consideration of the Defendants' motion to the threshold question of qualified immunity. Doc. #18. Accordingly, the remainder of the grounds for summary judgment asserted by the Defendants (including and especially the claims that there is no evidence of a failure to train that would expose the Defendant Village to liability and that there is no genuine issue of material fact that would allow a finding that Ables committed a constitutional tort), not having been fully briefed and argued by the parties, are overruled without prejudice to their renewal following the conclusion of discovery.

Given Dr. Schaffer's affidavit, which creates genuine issues of material fact as to the circumstances surrounding the shooting, the Court has, upon reflection, determined that oral argument on this issue is unnecessary. The genuine issues of material fact created by Dr. Schaffer's affidavit are not susceptible to being

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lawfully, given the information that was available to him at the time concerning the prior report of threatened deadly violence. As it turned out, his assumption (regarding the lawfulness of the entry) was not only reasonable, it was correct.

resolved by oral argument on legal issues. Accordingly, the Court, upon reconsideration, will vacate its Notation Order of November 22, 1993, which Order sustained the Defendants' request for oral argument on their motion for summary judgment (Doc. #12). The request for oral argument (Doc. #12) is overruled, as such oral argument is unnecessary.

Wherefore, based upon the aforesaid, the Defendants' motion for summary judgment (Doc. #11) is overruled in part and sustained in part. Said motion is sustained to the extent that it seeks a determination that, as a matter of law, the Defendant police officers' entry into the Bunch/Bravard home was lawful. Said motion is overruled, with prejudice, to the extent that it seeks qualified immunity for the individual officers. The remainder of said motion is overruled without prejudice.

The Defendants' Objections to Evidentiary Materials Submitted By Plaintiff (Doc. #32), construed as a motion to strike said materials, is overruled as moot.

The Request of Defendants for Oral Argument on Their Motion for Summary Judgment (Doc. #12) is, upon reconsideration, overruled. This Court's Notation Order of November 22, 1993, sustaining said request, is vacated.

A telephone conference will be had, between Court and counsel, on Wednesday, October 12, 1994, at 8:45 AM, for the purposes of determining whether the Defendants wish to file an immediate appeal of the qualified immunity ruling to the Sixth Circuit Court of Appeals. Should the Defendants indicate that they have no desire to take such an appeal, a discovery and briefing schedule will be set on the remainder of the summary judgment claims that the Defendants wish to advance.

See Doc. #18. Finally, a trial date and other dates leading to the resolution of this litigation will be established.

September 26, 1994

/s/ Walter Herbert Rice
United States District Judge

Copies to:

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APPENDIX C

UNITED STATES CODE, TITLE 42

§ 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT IV - SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX E

UNITED STATES CONSTITUTION

AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
SEP 27 1995
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(2)

No. 95-334

In The

Supreme Court of the United States

October Term, 1995

VILLAGE OF NEW LEBANON, et al.,

Petitioners,

v.

CYNTHIA BUNCH, ETC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the District Court and the Sixth Circuit Court of Appeals erred in holding that the existence of material factual questions defeat a motion for summary judgment.

TABLE OF CONTENTS

Page

STATEMENT OF FACTS 1

A. Defendant Ables Responds To A Domestic Dispute And Shoots To Death Plaintiff's 16-Year-Old Son, The Sole Occupant Of The House, Within Two Minutes Of His Arrival At The Scene 1

B. Defendant Ables' Unsupported Version Of Events Is Called Into Question By Physical Evidence And Uncontested Medical Expert Testimony 2

C. The District Court Ruled That Competing Versions Of Events Created Material Question For Jury Determination 5

REASONS TO DENY THE WRIT 6

I. This Evidence In This Case Raises Substantial Material Issues Of Fact And The Courts Below Correctly Determined That Such Issues Make Summary Judgment Inappropriate 6

II. The Decisions Below Neither Raise Constitutional Issues Nor Conflict With Decisions Of Any Other Circuit Court Of Appeals 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992) 9

Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993) 9, 10

Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988) 10

STATEMENT OF FACTS

A. Defendant Ables Responds To A Domestic Dispute And Shoots To Death Plaintiff's 16-Year-Old Son, The Sole Occupant Of The House, Within Two Minutes Of His Arrival At The Scene.

At 3:27 p.m. on the afternoon of January 28, 1992 the Montgomery County Sheriffs Office [MCSO] dispatcher took a call from Plaintiff Cynthia Bunch [Bunch] regarding a domestic dispute she was then having with her sixteen-year-old son, Aaron Bravard [Bravard].

At 3:30 p.m., Chief Carbaugh and Sgt. Lunsford of the New Lebanon Police Department, and Patrolman Murphy of the Jackson Township Police Department arrived at the Bunch residence.

Patrolman Ables, with the three other officers already on the scene, was the last to arrive. He pulled his gun and made a warrantless entry into Plaintiff's residence. Within two minutes of pulling up to the scene, with the benefit of no more information than that provided by the brief radio dispatch, or with no attempt to inquire as to the actual circumstances extent at the time of his arrival, Ables shot and killed Plaintiff's sixteen-year-old son who was alone in the house as he stepped out of the shower enclosure of his bathroom. At 3:32 p.m., Ables called for the ambulance.

Mrs. Bunch was outside the residence and in the presence of the Chief at all times from the time of the officers' arrival until well after Bravard had been shot. It is undisputed that Bravard was the only one in the residence. This fact was known to all of the officers prior to entering the residence. Mrs. Bunch was never in any

danger of harm at any time after the officers initially arrived at the residence. At no time did the officers seek nor did Mrs. Bunch give the officers permission to enter the residence. They had no warrant to enter the residence.

When Ables arrived at the scene he walked past the Chief and Mrs. Bunch who were conversing in the yard some distance away from the residence. Neither the Chief nor Mrs. Bunch ever expressed any alarm or concern that there was any need for immediate action by these police officers, in fact, the Chief, who was in command of the scene was not even aware that his officers were entering the residence until he looked up and saw them going inside. This situation was never considered to be anything more than a "domstic dispute" with the possibility that Bravard *might* be suicidal. These facts are undisputed.

B. Defendant Ables' Unsupported Version Of Events Is Called Into Question By Physical Evidence And Uncontested Medical Expert Testimony

Ables contends that he was being attacked by Bravard and shot in self defense. Ables' testimony is clear: he contends that he did not shoot Bravard until Bravard had exited the shower, turned to directly face him, and frontally attacked him with his right arm raised and holding a knife which was coming down in a slashing motion. At that point, he claims to have fired his automatic weapon.

Without question, if Ables' version of the facts had gone unrefuted, he would be entitled to qualified immunity. Plaintiff however produced evidence which directly

contradicted Ables' version of events. Plaintiff submitted proof, including uncontested medical expert testimony, that her son was shot in the side under his left arm pit not while attacking Ables but while getting out of the shower facing the wall in front of the shower.

Plaintiff submitted three key pieces of evidence which directly contradicted Ables' description of events surrounding the shooting – the affidavit of a pathologist and former deputy county coroner; the deposition testimony of the current deputy county coroner; and, the affidavit of Plaintiff. Defendants failed to oppose or challenge in any manner any of the statements contained in any of the affidavits or the deputy county coroner's deposition.

The affidavit of the former deputy county coroner unequivocally states, "it is physically impossible for the gunshot wound to Bravard to have occurred at a time when Bravard was directly facing Ables as described in Ables' testimony." This pathologist confirms that Ables shot Bravard as Bravard exited the shower, facing the *east wall of the bathroom*, in no position to attack or threaten Ables.

In addition to this evidence, Plaintiff deposed the present deputy county coroner who actually performed the autopsy of Bravard. He testified that it was "physically impossible" for Bravard's wounds to have occurred in the manner described by Ables. The "physical impossibility" testimony of these experts is based in large part upon the physical evidence itself. The bullet which killed Bravard entered under his *left arm pit* and travelled directly across his body *from left to right*. Such an entrance

point and direction of travel make it physically impossible for this wound to have occurred while Bravard stood directly facing Ables, who had his gun *waist high in his left hand two to three feet away* from Bravard.

It was Bravard's left side which faced Patrolman Ables with the bullet entering Bravard's left arm pit and travelling in a straight direction across his body. These facts are the uncontested conclusions of the autopsy and are not minimal discrepancies as Defendants argue. Ables simply could not have apprehended any threat of imminent bodily harm – Bravard was facing the wall, not Ables; he was not attacking or approaching Ables, but stepping out of the tub enclosure; and, he was in no position to slash at Ables with a knife purportedly held in his right hand with his left side nearest to Ables.

In addition to this medical expert testimony which remains uncontested by Defendants, Plaintiff submitted scale diagrams of the bathroom and shower enclosure. The diagram established that the deceased could only have exited the shower enclosure by pushing the bathroom door closed in order to widen the 14-inch enclosure opening. Bravard was five feet, ten inches tall and weighed 190 pounds. The Bunch affidavit makes it clear that no one the size of Bravard could have leaped through such a small opening in the manner described by Ables.

Plaintiff's affidavit, based on her years of actual experience of entering and exiting the same shower enclosure, also confirmed that it is necessary to push the bathroom door *closed* in order to widen the 14-inch opening and exit the shower. Ables clearly positions himself

standing in front of the *open* bathroom door when he shot Bravard.

Defendants submitted no affidavits, expert testimony or other material which contested or disputed this evidence. Defendants have never disputed the accuracy of the diagram submitted by Plaintiff. They have never challenged Plaintiff's assertion that the 14-inch shower enclosure opening was too small for Bravard to have leaped through in the manner Ables contends. They have never provided any expert testimony to support Ables' contentions or to attack or qualify the testimony of Plaintiff's experts.

Petitioners in their Petition indicate that Ables had been cut while in the bathroom. This statement is totally unsupported. At deposition, Ables testified that some time after the shooting after he had exited the residence he noticed a small scratch on one of his fingers which *he assumed to be a cut*. More on point is the deposition testimony of both Patrolman Ables and Sgt. Lunsford that no one had seen Bravard even attempt to cut Ables and that there is no physical evidence to support such a conclusion.

C. The District Court Ruled That Competing Versions Of Events Created Material Question For Jury Determination

The District Court concluded that the affidavits and supporting materials presented competing versions of what actually happened. The District Court further

concluded that the physical evidence is consistent with a version of events that would question the reasonableness of Ables' opinion that Bravard posed such a threat that shooting him was reasonable in the contest of qualified immunity. Given these fundamental questions, both the District Court and the Court of Appeals concluded that material jury questions exist.

REASONS TO DENY THE WRIT

I. This Evidence In This Case Raises Substantial Material Issues Of Fact And The Courts Below Correctly Determined That Such Issues Make Summary Judgment Inappropriate.

The Courts below found several factual disputes and discrepancies with regard to material issues. These issues go directly to the reasonableness of Patrolman Ables' use of deadly force.

Without question, Defendants have the right to argue that Ables' version of the facts should be believed and that any discrepancies are either minor or explainable. Defendants, however, cannot demand as a matter of law that the courts ignore factual evidence, ignore the implications of that evidence and conclude that any inferences should be resolved in favor of Defendants.

The physical facts and expert testimony indicate that Patrolman Ables shot Bravard (deceased) as he attempted to exit the shower of his own bathroom. Bravard was shot as he was facing the east wall of the bathroom, at a 90-degree angle to Ables – not facing Ables as contended by

the Defendants. Defendants attempt to mislead this Court by contending that the courts below based their rulings solely on the angle of the path of the bullet into Bravard's body. As significant as the bullet path is, however, it is not the only basis for the court's conclusion.

As the circuit court noted, the *totality* of the factual disputes and discrepancies are of such character that a person could reasonably conclude that Patrolman Ables did not act reasonably when he shot Bravard. The record contains a long list of cumulative facts in addition to the bullet's path – facts ranging from the autopsy report, the diagrams of the bathroom and Plaintiff's uncontested affidavit to the unchallenged testimony of two medical expert pathologists that it is "physically impossible" not only for things to have occurred as described by Ables but that the evidence indicates Ables was never threatened at all. Based upon a review of this material, it is clear that any reasonable person could conclude that Bravard was never in any position to do Patrolman Ables any bodily harm.

Next, Defendants fault the lower courts for not accepting their version of events. Defendants have always based their argument on the assumption that "Ables was suddenly confronted with a knife wielding individual" (Brief, p. 7) in a small place. The question is whether courts are required to start with that assumption, especially when substantial evidence exists which calls that assumption into question. Defendants fail to realize that the evidence in the record disputes this most basic fact concerning the essential elements of Plaintiff's claim and Ables' claim of self defense. It is exactly this dispute that must be resolved by a jury.

Defendants do not deny that factual disputes exist. Instead they complain that the courts below should have weighed the evidence and concluded that these factual disputes and conflicts were immaterial. The ultimate question raised by this case is whether Bravard was even in a position to be a threat or to be reasonably perceived as a threat to Patrolman Ables. All of the evidence Defendants are complaining about goes directly to this point. There simply is no legal support for the proposition that these lower courts had a duty to accept Defendants' starting assumption and then weigh the evidence within the context of that assumption *and* ignore the inferences favorable to the Plaintiff raised by that evidence.

Given the substantial discrepancies raised by the affidavits, diagrams, depositions and other materials which support Plaintiff's claim that her son was shot as he stepped out and over the tub enclosure, it was entirely appropriate for the lower courts to consider the justifiable inferences in Plaintiff's favor and deny summary judgment.

II. The Decisions Below Neither Raise Constitutional Issues Nor Conflict With Decisions Of Any Other Circuit Court Of Appeals.

At page 8 of their brief, Defendants plainly state their essential complaint against the decisions of the courts below. According to Defendants, the problem with those decisions is that "[they] permit[s] differing versions of an occurrence to rise to the level of genuine issues of material fact." (Brief, p. 8) Defendants contend that such a decision conflicts with other cases. Plaintiff respectfully

submits that no such conflicts exist. Defendants do not quibble with the determinations that factual disputes exist in the instant case. Instead they argue that other cases somehow stand for the proposition that "differing versions of an occurrence" cannot constitute material questions. This position has absolutely no support in the law.

In *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992), the district court determined that there were certain small discrepancies that did not rise to the level of creating a genuine issue of material fact.

Defendants attempt to create a conflict between the instant case and *Fraire, supra,* because the courts below determined that the material issues of fact exist in the instant case. Such a factual juxtaposition does not create a conflict between the cases. Plaintiff does not dispute that some cases may present inconsequential inconsistencies. Certainly everyone would concede that different cases may present different facts and, accordingly, each case would require conclusions based on the specific facts of that respective case. This fact does not however stand for the proposition that discrepancies in all cases are as a matter of law minor and inconsequential.

Defendants' reliance on *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir. 1993) is even more suspect. In *Krueger, supra,* the officer's testimony of what had transpired was totally undisputed. This stands in stark contrast to the instant case, in which Ables' testimony is totally contradicted by the physical evidence. Plaintiff respectfully submits that no conflict exists between *Krueger* and the instant case.

The facts are so divergent that the two are not comparable.

In fact, the Sixth Circuit Court of Appeals did consider the *Krueger* case in reaching its decision. That court rejected any purported conflict and instead correctly pointed out that its decision in the instant case is entirely consistent with the Eleventh Circuit case of *Samples v. City of Atlanta,* 846 F.2d 1328 (11th Cir. 1988). *Samples, supra,* involved, just as does the instant case, a discrepancy between the version of events put forward by a police officer who shot a person in the back but claimed the victim was advancing toward him with a knife. In cases such as these that involve material factual disputes, summary judgment is simply not the appropriate method for resolving the controversy. This proposition is entirely consistent with existing case law and does not present any conflict between the circuits.

The instant case presents no question of importance or constitutional magnitude. The analysis and conclusions arrived at by the lower courts directly relate to the evidence presented by the specific facts of this case.

CONCLUSION

Respondent respectfully submits that Petitioners have failed to establish any reason why a writ should be granted. For all the reasons discussed above, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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